## IX. LEGAL AUTHORITY

A Performance Assessment Plan consists of several parts, all of which require our authority to implement. An effective Performance Assessment Plan consists of a set of comprehensive, adequately defined measures, benchmarks and analogs, and an appropriate remedy plan. While not clearly addressed in the briefs, there does not appear to be any dispute regarding our authority to implement measures, benchmarks, and analogs. Therefore, we will address this issue first. Next, we will discuss our authority to enforce the performance measures and the parties' arguments on our authority to implement a self-executing remedy plan. A self-executing remedy plan includes the Tier 1 and Tier 2 enforcement mechanisms discussed by the parties herein, and the automatic penalties discussed below. We will also discuss whether we would be improperly delegating our enforcement of the performance measures.

### A. Authority to Implement Measures and Benchmarks

Both Chapter 364, Florida Statutes, as amended in 1995, and the Telecommunications Act of 1996 mandate the opening of local telecommunications markets to competition. Both statutes require incumbent local exchange companies to provide access to and interconnection with their facilities to competitive carriers. Both statutes contemplate a central role for the state commission in implementing these requirements. Both statutes authorize state commission review and authority over interconnection agreements between incumbents and competitors.

Section 47 U.S.C. §252 authorizes a state commission to approve negotiated interconnection agreements and arbitrate agreements where negotiations fail. Section 47 U.S.C. §252(b)(4)(c), provides that the state commission shall resolve arbitrated interconnection issues by imposing appropriate conditions as required, to implement the substantive interconnection provisions of the Act. Section 252 also requires that the state commission approve all negotiated and arbitrated agreements. Section 251(d)(3), Preservation of State Access Regulations, states that:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall

> not preclude the enforcement of any regulation, order, or policy of a state commission that --
>
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section;
> and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Thus, state laws implementing interconnection agreements are not preempted by federal law if they are consistent with the 1996 Act. Section 364.162, Florida Statutes, authorizes us to set nondiscriminatory rates, terms, and conditions of interconnection. See also Section 364.19, Florida Statutes, (stating that "[t]he commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.") In this proceeding, the appropriate terms to encourage non-discriminatory access are adequately defined measures, benchmarks and analogs. Consequently, we have the authority under state and federal law to implement the measures, benchmarks, and analogs contained in this Order.

B. Authority to Enforce

1. Payments to ALECs

Arguments

In her direct testimony, BellSouth witness Cox agrees with witness Stallcup's opinion on our authority to order monetary damages and that the parties would have to enter a voluntary agreement before we could approve a Tier 1 enforcement mechanism. Witness Cox states that "BellSouth is willing to voluntarily submit to the self-effectuating enforcement mechanism described in witness Coon's testimony, provided the metrics are appropriate."

Witness Cox recognizes that BellSouth cannot obtain authority to provide inter-LATA service unless the FCC

determines, with input from this Commission, that BellSouth is providing nondiscriminatory access to all ALECs in Florida. Upon cross-examination, witness Cox admitted that the FCC "is going to want to see an enforcement plan." However, BellSouth is "hopeful that throughout this process we can come up with one we can all live with."

In its brief, BellSouth argued that we lack the ability to impose a "self executing remedy plan" (i.e. requiring BellSouth to pay penalties when it fails to meet the plan's measurements) without BellSouth's consent. BellSouth states that the Act does not give us the explicit authority to order automatic penalties akin to liquidated damages. Moreover, BellSouth believes that our reluctance to impose automatic penalties in the context of interconnection agreements undercuts any argument that the authority to impose automatic penalties is implicitly granted by Section 251. BellSouth states that our findings in the BellSouth and AT&T arbitrations that automatic, or self-effectuating, penalties are tantamount to liquidated damages, which we do not have the authority to order under state law, would have settled the argument but for the decision in MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp 2d 1286 (U.S.D.C., No. D. FL, 2000).

In MCI, the court considered whether a provision for damages must be included in the interconnection agreement between the parties. The court found that "if a compensation provision were truly required by the Telecommunications Act and could be adopted in some form without imposing on the Florida Commission an unconstitutional burden . . . then any contrary Florida law obviously would not preclude adoption of such a provision." Id. at 1298. The court held that we must consider anything that a party raises in an arbitration. However, the court noted that "nothing in this Order should be read as an indication that the Telecommunications Act imposes on state Commissions an obligation to perform any enforcement role requested by the parties, or that Congress lawfully could impose any such obligation on state commissions." Id.

In its brief, BellSouth states that "the Court did not identify any state law that actually provides the authority to order a liquidated damages provision/enforcement mechanism/penalty."

While BellSouth agrees with witness Stallcup's understanding of the law, BellSouth believes that the statements within the Proposal – "failure to comply with the plan will be deemed to be an admission of willful violation of the Commission rules" – assumes that BellSouth will agree to all penalties proposed by our staff and/or approved by us, which BellSouth clearly has not done. While this is not an issue if we adopt BellSouth's Plan, BellSouth states it will not reject any reasonable self-effectuating remedy proposal, even if it deviates from that which BellSouth has already consented. Meanwhile, the ALECs have proposed a plan that is a virtual "cash machine," to which BellSouth cannot agree.

In their brief, the ALECs state that this Commission has the authority to order the implementation of a self-executing remedy plan under the Telecommunications Act of 1996, with or without BellSouth's consent. The ALECs cite to an Order of the Pennsylvania Commission, in which that Commission found that "[its] implementation of performance measures and standards is a legitimate exercise of this Commission's authority to ensure that BA-PA fulfills Section 251 obligations." Likewise, the ALECs argue, that our adoption of a self-executing remedy plan is simply an exercise of our authority to enforce Section 251.

The ALECs argue that because our authority to adopt a self-effectuating remedy plan is delegated to us by the Act, "under the Supremacy Clause, any contrary Florida law would not preclude adoption of such a plan." "Further, this Commission has recognized its authority to implement such policies on a generic basis rather than in individual arbitrations." See Order No. PSC-99-1078-PCO-TP, issued May 26, 1999, in Docket No. 981834-TP MCI, 112 F. Supp. 2d at 1286. See also In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Docket No. 99-00430, Interim Order of Arbitration Award, p. 12 (August 11, 2000)(TRA [Tennessee Regulatory Authority] concludes it has authority to arbitrate enforcement mechanisms).

The ALECs contend that because we must ensure nondiscriminatory treatment pursuant to Section 251, we must require BellSouth to implement a self-effectuating remedy plan now, not after BellSouth meets the criteria for Section 271 approval. As the Georgia Public Service Commission points out, a

remedies plan not only helps to avoid backsliding, but also enables more rapid development of competition, and encourages BellSouth to provide nondiscriminatory service during the critical early stages, while providing some compensation to CLECs for additional costs they incur when BellSouth's performance falls short. In re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, Docket No. 7892-U, Order, p. 22 (Oct 3, 2000).

DECISION

We find it unnecessary to determine at this time whether or not we have authority to enforce payments to ALECs under this plan, or otherwise approve a self-effectuating plan containing such payments, because it appears that BellSouth is willing to implement such a plan, as long as it is reasonable. A problem only arises if BellSouth contends that any plan approved by us is unreasonable. Only then would we need to make a determination on this issue. Thus, we refrain from making a determination on this aspect of our authority at this time. If the reasonableness of ALEC payments under a plan approved by us is contested, we will make a determination based on the state of the law at the time our authority is actually contested when, perhaps, some level of clarity will have been reached[1].

While our authority in this area is not yet settled and need not be reached at this time, we note that spirited and informative arguments were put forth by both sides regarding our jurisdiction. Of particular note are the implications of the decision in MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp 2d 1286 (U.S.D.C., No. D. FL, 2000), wherein the Court decided that we can arbitrate and adopt such provisions, but noted that, "[n]othing in this order should be read as an indication that the Telecommunications Act

[1]As noted by Judge Hinkle in MCI Telecomms. Corp. v. BellSouth Telecomms., Inc. and reiterated in AT&T Communications of the Southern States, Inc., Plaintiff, v. BellSouth Telecommunications, Inc., et al., Defendants. 122 F. Supp 2d 1305 (N.D. Fla. 2000):

> The rapidly evolving judicial, administrative and technological developments in the telecommunications field render the task of the Florida Commission (and this court on review) somewhat akin to shooting at a moving target, one whose movements are neither constant nor predictable.

imposes on state commissions an obligation to perform any enforcement role requested by the parties, or that Congress lawfully could impose any such obligation on state commissions." Id. at fn. 16. Thus, the Court did not directly address whether or not we could enforce such provisions, although we had argued that we could not under Southern Bell Tel. and Tel. Co. v. Mobile America Corp., 291 So. 2d 199 (Fla. 1974).

We also emphasize that payments to the ALECs are a crucial aspect of the plan. As stated by the Georgia Public Service Commission, such a plan enables competition to develop more rapidly, and will encourage BellSouth to provide nondiscriminatory service during the critical early stages, while providing compensation to the CLECs for additional costs that they occur when BellSouth's performance falls short. In re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, Docket No. 7892-U, Order, p. 22 (Oct. 3, 2000). Such goals are in line with the Florida Legislature's mandate to encourage competition through the flexible regulatory treatment of providers and ensure that all providers are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint. Sections 364.01(4)(b) and (g), Florida Statutes. Thus, it is arguable that payments to ALECs under our plan do not even fall within the realm of "liquidated damages" as contemplated by the Mobile America court, but, instead, are simply a mechanism to level the competitive playing field when BellSouth does not, or cannot, meet the benchmarks.

2. Penalties

Arguments

At the hearing, Commission staff witness Stallcup testified that it was his "understanding that we do not have the authority to receive penalty payments absent a finding of a willful violation of a Commission order, rule, or statute." Normally, violations are determined through a "show cause" proceeding which provides an opportunity for the party "to present a case as to why it should not be fined for the alleged violation."

To avoid lengthy "show cause" proceedings and to make the Tier 2 enforcement mechanism self-effectuating, witness Stallcup proposes that BellSouth agree that any failure to provide

compliant service under Tier 2 would constitute a willful violation of the final order resulting from this docket. He also testified that "[i]n addition, the agreement would obligate BellSouth to remit any penalties resulting from Tier 2 to the Florida Public Service Commission for deposit in the State's General Revenue Fund."

While BellSouth agrees with witness Stallcup's understanding of the law, BellSouth believes that the statements within the Proposal -- "failure to comply with the plan will be deemed to be an admission of willful violation of the Commission rules" -- assumes that BellSouth will agree to all penalties proposed by Commission staff, which BellSouth clearly has not done. While this is not an issue if we adopt BellSouth's Plan, BellSouth states that it will not reject any reasonable self-effectuating remedy proposal, even if it deviates from that which BellSouth has already consented. Meanwhile, BellSouth argues that the ALECs have proposed a plan that is a virtual "cash machine," to which BellSouth cannot agree.

As for the ALECs, as stated above, they believe that because our authority to adopt a self-effectuating remedy plan is delegated to it by the Act, "under the Supremacy Clause, any contrary Florida law would not preclude adoption of such a plan."

DECISION

We find that our power to penalize BellSouth for failure to comply with implemented benchmarks is set forth in Section 364.285, Florida Statutes. Section 364.285, Florida Statutes, provides, in part, that

> (1) The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $25,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it.

Thus, we clearly have jurisdiction to impose penalties for failure to comply with benchmarks set and approved by this Commission.

The next question then becomes whether we can implement a mechanism whereby a finding of willful violation of the benchmarks and the appropriate penalty are self-effectuating, thereby, eliminating the need for a Show Cause proceeding. We find that a failure to comply with the permanent performance measures contained within any plan adopted by this Commission may be deemed to constitute a prima facia showing that the company has violated an order of this Commission. It could then be argued that this initial showing would constitute a finding of willful noncompliance allowing for the imposition of the appropriate penalties. However, we find that in order to comply with the requirements of due process, it is necessary to provide BellSouth with an opportunity to respond and/or provide a defense prior to the date upon which any penalty payment would become due. As set forth in Miami-Dade County v. Reyes, 772 So. 2d 24 (Fla. 3rd DCA 2000):

> While "the concepts of due process in an administrative proceeding are less stringent than in a judicial proceeding, they nonetheless apply. Id. at 29 (citing A.J. v. State, Dep't. of HRS, 630 So. 2d 1187, 1189 (Fla. 2d DCA 1994)).
>
> Nevertheless, the Florida Supreme Court has found that:
>
> First, "procedural due process in the administrative setting does not always require application of the judicial model." Dixon v. Love, 431 U.S. 105, 115, 97 S. Ct. 1723, 1729, 52 L. Ed. 2d 172 (1977). Thus the formalities requisite in judicial proceedings are not necessary in order to meet due process requirements in the administrative process.

Hadley v. Dept. of Administration, 411 So. 2d 184, 187-188(Fla. 1982). Further explanation of the requirements of due process is set forth in Rucker v. City of Ocala, 684 So. 2d 836 (Fla. 1st DCA 1996):

> To qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive. Sokolowski, 439 So. 2d at 934 ("To qualify under due process standards, the opportunity to be heard must be meaningful."). . . . See also Neff v. Adler, 416 So. 2d 1240, 1242-43 (Fla. 4th DCA 1982)("The fundamentals of procedural due process are (1) a hearing (2) before an impartial decision-maker, after (3) fair notice of the charges and allegations, (4) with an opportunity to present one's own case."). Nevertheless, "the manner in which due process protections apply vary with the character of the interests and the nature of the process involved." Real Property, 588 So. 2d at 960. "There is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met." Id.

Based on the above analysis, we find that self-effectuating Tier 2 penalties can be implemented by us, as long as BellSouth is given a meaningful opportunity to respond and/or defend itself in a Section 120.57, Florida Statutes, hearing, before any penalty is assessed by the mechanism.

> In order to provide an adequate clear point of entry the notice does not have to track any particular language or recite statutory provisions verbatim, so long as it clearly informs the affected party of its rights and the time limits.

Florida League of Cities v. Administration Comm., 586 So. 2d 397 (Fla. 1st DCA 1991); Capital Copy Inc. v. University of Florida, 526 So.2d 988 (Fla. 1st DCA 1988); Lamar Advertising Co. v. Department of Transportation, 523 So.2d 712 (Fla. 1st DCA 1988).

We emphasize that the Florida Leagues of Cities case seems directly on point on this issue. In that case, two local governments failed to submit their growth management plans to the Administration Commission on time. As a result, they were fined and denied hearings. The Commission's sanctions policy was challenged as a violation of due process, an unadopted rule, and an unlawful delegation of authority. The court determined that the policy did not fit the definition of a rule under Section

120.52(16), Florida Statutes, and that it did not constitute an unlawful delegation of authority. However, the court did determine that the policy did not provide a sufficient point of entry for those subject to the policy to request a hearing, stating that, "[u]ntil proceedings are had satisfying section 120.57, or an opportunity for them is clearly offered and waived, there can be no agency action affecting the substantial interests of a person." Florida League of Cities, 586 So. 2d at 413. Under our mechanism, BellSouth will have full notice of the charges against it if it fails to comply with a benchmark, and it will have the opportunity to present its case to us. We find that the opportunity to request a hearing under the plan is sufficient to meet the due process requirements in accordance with the cited cases.

We note that we were initially concerned about our ability to delegate our enforcement authority in this area, because of "the rule that in the absence of statutory authority, a public officer can not delegate his powers, even with the approval of the court." State v. Inter-American Center Authority, 84 So. 2d 9, 13-14 (Fla. 1955).[2] However, we find that the facts of this case do not constitute a delegation of authority. In the cases addressing improper delegation of authority by an agency, the agency was actually delegating its decision-making authority. In this instance, we are establishing the benchmarks and analogs. We are also establishing a self-effectuating penalty mechanism. No decision will be made by BellSouth. BellSouth will have no discretion as to which benchmarks will be enforced, nor will it decide how much it will pay for failing to meet those benchmarks (although it will have the opportunity to avoid incurring penalties by meeting those benchmarks). Any problems arising from the Performance Assessment Plan will be addressed solely by us. Consequently, we will not be delegating any of our authority, much less doing so improperly. See also Florida League of Cities v. Administration Comm., 586 So. 2d 397 (Fla. 1st DCA

[2]This principle was further explained in an opinion of the Attorney General which stated that "in the absence of statutory authorization, the Department of General Services cannot delegate its power and duty to supervise the construction of state buildings and to enforce the building code adopted for the construction of state buildings." Op. Att'y Gen. Fla. 83-88 (1983). More recently, in Johnson v. Bd. of Architecture and Interior Design, 634 So. 2d 666, 667 (1994), the court held that there was no statutory authority for the Board to delegate its power to approve or deny applications to an appointed "Interior Design Committee."

1991 ("The Commission is executing and enforcing law within the specific parameters placed by the legislature on the exercise of its discretion.") As such, we find that we can implement the Tier 2 penalties set forth in the plan.

Based on the foregoing, we find that Section 364.285, Florida Statutes, allows us to penalize BellSouth for failure to comply with Commission rules, statutes, or Orders. We also find that should BellSouth report that it has missed benchmarks set forth in the approved plan, such could be deemed to constitute a prima facia showing that the company has willfully failed to comply with our performance measures, unless BellSouth provides an explanatory response within a specified time. Failure to respond as specified would allow for the imposition of appropriate Tier 2 penalties. Thus, in order to comply with the requirements of due process, BellSouth must be given an opportunity to respond and/or provide a defense prior to the date upon which any penalty is deemed "assessed," and the payment becomes due. As such, we find that BellSouth shall be allowed to respond not later than 21 days after reporting that it has failed to comply with any performance measure. The company's response shall be in writing and shall set forth specific allegations of fact and law explaining why the situation that has resulted in noncompliance was not a "willful" violation. We can then make an initial determination as to whether BellSouth's noncompliance was, indeed, willful based upon the filings. We note that this initial determination would, however, need to provide BellSouth with the opportunity to request a hearing. In some circumstances, it may be appropriate to set the matter for an expedited hearing without the intervening step of our making an initial determination based upon BellSouth's response. We note that this analysis is equally applicable to the automatic penalties implemented below.

We note that we are hopeful that most instances of noncompliance will not be contested and will not result in a hearing. We add that this type of process is also apparently what the FCC has in mind. As the FCC stated, an effective enforcement plan shall "have a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal." BA NY Order ¶ 433.

As stated above, all parties agree that with BellSouth's consent, we may order a self-executing remedy plan. Based on the same analysis set forth above, we agree that we can implement a self-executing remedy plan with BellSouth's consent. BellSouth's overt consent also eliminates the lack of clarity regarding enforcement of Tier 1 penalties and would be considered a waiver of any due process concerns regarding Tier 2 penalties. Furthermore, we note that if BellSouth were to consent, the Tier 2 penalties could be implemented without the response period outlined above. We find that such agreement is possible, in view of BellSouth's statement in its Brief that it ". . . will not reject out of hand the prospect of agreement with any reasonable self-effectuating remedy proposal ordered by the Commission, even if it deviates from that to which BellSouth has already consented."

## X. TIMELY POSTING OF PERFORMANCE DATA AND REPORTS TO THE WEBSITE

In this Section, we address whether BellSouth should be penalized for failure to post performance data and reports to the Web site by the due date. BellSouth believes that because of the complexity of the reports, it is inevitable that some problems will arise in posting a report. The ALECs contend that BellSouth has been delinquent in posting the reports in the past and that a potential remedy to the tardiness is to penalize BellSouth.

### Arguments

BellSouth witness Coon argues that the increasing complexity of the measurements and submetrics, the volume of data processed, and the validation of reports prior to posting impose additional burdens on BellSouth and, therefore, the company should not be subjected to a late-posting penalty. He further contends that BellSouth makes every reasonable effort to furnish the reports by the deadline to the ALECs, but with the volume of data and reports, it would be foolish to assume that there will never be a problem posting a report. Witness Coon also states that it is doubtful whether ALECs are even harmed by late posting, since few ever even access PMAP at all.

According to the BellSouth brief, the issue of the amount of any penalty to be levied for late filing involves two separate questions. The first is whether this Commission can assess any

penalty against BellSouth that is involuntary and automatic. The second is that if this Commission can do so, what should the penalty be. For the reasons discussed above, BellSouth does not believe that this Commission has the power to assess voluntary penalties against BellSouth. However, if this Commission finds otherwise, then the next question is the amount of the penalty. As Mr. Coon notes in his testimony, our staff proposed a penalty of $2,000 per day. Assuming that this applies to the aggregate of reports, rather than each individual report, BellSouth believes that this amount is reasonable.

ALEC witness Bursh contends that BellSouth has already been late in submitting performance reports and should pay penalties to this Commission for late, inaccurate and incomplete reports. According to the ALEC Coalition, one of the key functions of an effective remedy plan is to motivate an ILEC to provide parity service to ALECs. BellSouth's posted performance data and reports are the most effective means available to ALECs and this Commission to ensure that BellSouth is complying with designated performance standards and providing parity service to ALECs as required by the Act. BellSouth's posted performance data and reports are also the best means by which ALECs can identify issues regarding BellSouth's systems, processes and performance that need to be addressed. If this information is not provided to ALECs by the due date, or is incomplete or inaccurate when provided, the ability of the ALECs and this Commission to determine if BellSouth is providing parity service is hindered. Moreover, problems that affect an ALEC's ability to serve its customers cannot be detected or corrected in a timely manner.

Additionally, all parties agree that the self-effectuating nature of an enforcement mechanism is essential to its success. However, the ALECs contend that the self-executing nature of the remedy plan will likely be compromised if BellSouth does not meet its obligation to post performance data and reports by the due date. ALECs should not be put in the position of having to approach this Commission to force BellSouth to provide performance data and reports as required in the enforcement plan. Therefore, BellSouth should be required to comply with all reporting deadlines ordered by this Commission.

According to the ALEC Coalition brief, the $5,000 and $1,000 amounts included in the ALEC plan represent the amounts that the

ALECs believe are necessary to motivate BellSouth to comply with its reporting obligations. However, the ALECs state that it is critical that this Commission set penalty amounts for late, inaccurate, and incomplete posting of reports and data that are sufficient to motivate BellSouth to comply with its reporting obligations. Otherwise, the self-enforcing mechanism of the remedy plan will be hampered because neither ALECs nor this Commission will be able to properly monitor BellSouth's performance.

DECISION

We agree with the ALEC Coalition that BellSouth's posted performance data and reports are the most effective means available to ALECs and this Commission to ensure that BellSouth is complying with the performance standards and providing parity service to ALECs as required by the Act.

BellSouth witness Coon does not believe we have the authority to impose involuntary penalties. We disagree. As set forth in the previous section, we can impose penalties, as long as the requirements of due process are met.

BellSouth argues that unless there is a systematic failure in posting reports, there should be no penalty for late posting. We find that BellSouth shall be responsible for penalties relating to systematic failures and also late posting. Both ALECs and we need to access the performance data and reports to determine parity and it is BellSouth's responsibility to provide this information.

We note that the performance assessment plans for Georgia and Texas both include a penalty mechanism for failure to post performance data and reports by the due date. (Exhibit 1, Docket No. 7892-U, Order In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale, January 12, 2001; Exhibit 1, Interconnection Agreement-Texas between Southwestern Bell Telephone Company and CLEC (T2A) 010700) We agree with the Georgia and Texas Commissions regarding the ILEC's obligation to post performance data by the due date and the need for a penalty for failure to do so.

XI. AMOUNT OF PENALTY FOR UNTIMELY POSTING AND DUE DATE FOR PAYMENT

BellSouth does not believe that any penalty should be assessed. Nevertheless, it agrees with the penalty proposed by our staff of $2,000 per day for the aggregate of all reports, if we deem a penalty appropriate. The ALECs believe that the remedy fee should be $5,000 per day per measurement.

Arguments

BellSouth witness Coon believes the Florida Commission cannot impose monetary penalties unless there is a violation of a Commission Order, rule or statute. He further maintains that the ALECs are not monetarily harmed when the reports are posted late, and additionally, very few ALECs choose to access this data. Nevertheless, witness Coon does state that the amount proposed by witness Stallcup of $2,000 per day, to be paid to this Commission, is acceptable to BellSouth if this Commission decides to impose such penalties on BellSouth for failure to post performance reports to the Website by the due date.

ALEC Coalition witness Bursh contends that the ILEC should be liable for payments of $5,000 to a state fund for every day past the due date for delivery of the reports and data. Witness Bursh adds that ALECs have already experienced late submission of performance reports by BellSouth.

DECISION

Given our finding that a penalty shall be assessed for late filing, we find that $2,000 per day for the aggregate of the reports is an appropriate assessment. This amount is consistent with the amount imposed in other jurisdictions. The Performance Plan approved by the Georgia Public Service Commission has established that BellSouth is liable for payments of $2,000 per day if reports are late. See Docket No. 7892-U, Order In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale, January 12, 2001. Further, BellSouth witness Coon testified that $2,000 is acceptable.

We find that BellSouth shall pay the penalty to this Commission for deposit in the State General Revenue Fund within

fifteen (15) calendar days of the actual publication date. All parties are in agreement regarding payment of the penalty to the State via the State General Revenue Fund.

The ALECs state that they have already experienced late posting of performance reports and that they rely heavily on this information. According to BellSouth, however, ten percent of the registered ALECs in the region actually access PMAP data. We question how important timely access to the PMAP data is to ALECs since few ALECs actually access this information. Since only 10% of the registered ALECs are accessing this information, we find that $2,000 per day is a sufficient and appropriate assessment.

BellSouth shall develop a Performance Assessment Plan that includes a self-executing voluntary enforcement mechanism if performance data and reports are not posted to the BellSouth Interconnection Services Website by the due date. This penalty shall incomplete or inaccurate. A penalty of $2,000 per day shall be assessed for the aggregate of all such reports. This payment shall be made to the Florida Public Service Commission, for deposit into the State General Revenue Fund, within 15 calendar days of the actual publication date.

## XII. PENALTIES FOR INCOMPLETE OR INACCURATE PERFORMANCE DATA AND REPORTS

Herein, we consider whether BellSouth is under an obligation to post complete and accurate performance data and reports to the Web site. This issue is important because if the information is incomplete or inaccurate when provided, the ability of the ALECs and this Commission to determine if BellSouth is providing parity service is hindered.

### Arguments

Witness Coon contends that the definitions of "incomplete" and/or "inaccurate" are so imprecise that there would likely be an ongoing administrative burden each month to determine what is incomplete or inaccurate. He believes that the emphasis needs to be directed toward providing complete and accurate reports and correcting any errors as quickly as possible. Witness Coon asserts that the automatic assessment of penalties would

discourage the correcting of the reports, even if they were appropriate.

Witness Coon states that this Commission cannot impose monetary damages unless BellSouth is in violation of a Commission Order, rule or statute. However, if this Commission concludes that it may do so, BellSouth believes that the amount that has been proposed by our staff ($400 per day) is acceptable provided it applies to the aggregate of all reports.

Witness Bursh believes that BellSouth should be subject to penalties for inaccurate and incomplete performance reports since the ALECs have already experienced problems of this nature. She further states, "if this information is incomplete or inaccurate when provided, the ability of the ALECs and the Commission to determine if BellSouth is providing parity service is hindered. Moreover, problems that affect an ALECs ability to service its customers cannot be detected or corrected in a timely manner."

In their brief, the ALECs contend that:

> Mr. Coon's suggestion that BellSouth would be willing to accept . . . $400 a day for the incomplete or inaccurate posting o[f] reports and performance data in staff's proposal, so long as it applies to the aggregate of all reports, is ridiculous. The purpose of this penalty is to motivate BellSouth to meet its performance reporting obligations, not to find an amount that BellSouth is comfortable with paying as a cost of doing business. Common sense suggests that in order to affect behavior, any consequences must be set at a level that the party does not wish to pay, otherwise the desired result will not be achieved. Thus, . . . $400 a day for inaccurate or incomplete reports or performance data, which BellSouth is apparently willing to pay, would not be adequate to motivate BellSouth to meet its performance reporting obligations.

DECISION

We concur with the ALEC Coalition that a penalty should be applicable in this instance since ALECs depend on BellSouth to

provide these reports in a complete and accurate manner. We find that an incentive to post reports in an accurate and complete manner is appropriate. It is BellSouth's responsibility to provide this information to the ALECs and to this Commission in an accurate and timely manner. We note that both the performance plans for Georgia and Texas include a requirement that the ALECs will have access to complete and accurate monthly reports or otherwise a penalty will be assessed.

We disagree with BellSouth witness Coon that the terms "incomplete" and "inaccurate" are sufficiently ambiguous to preclude taking any action to prevent improper reporting of the data. For purposes of determining the applicability of penalties, reports shall be deemed to be incomplete if they do not present all of the required data as specified above. Similarly, reports shall be deemed inaccurate if any of the required data is not calculated as specified in the SQM plan.

BellSouth witness Coon does not believe this Commission has the authority to impose involuntary fines upon BellSouth; however, BellSouth does state the $400 per day penalty is reasonable if this Commission does impose a penalty. Since BellSouth is agreeable to a $400 per day penalty, we find that the issue of our authority need not be addressed. Nevertheless, we find that if BellSouth did not agree, we could still impose penalties, as long as the requirements of due process are met, as set forth above.

Complete and accurate performance reports are necessary for the ALECs and this Commission. A penalty will establish an incentive for BellSouth to post the reports in a complete and accurate fashion.

BellSouth shall develop a Performance Assessment Plan that includes a self-executing voluntary enforcement mechanism if performance data and reports are incomplete or inaccurate.

## XIII. AMOUNT OF PENALTY FOR INCOMPLETE OR INACCURATE DATA AND REPORTS

In this Section we address the penalty amount and the payment deadline. BellSouth does not believe that any penalty should be assessed, but if assessed, BellSouth agrees with the

penalty proposed by our staff of $400 per day for the aggregate of all reports. The ALECs believe the remedy should be $1,000 per day.

Arguments

BellSouth witness Coon does not believe that BellSouth should be penalized for incomplete or inaccurate reporting. Witness Coon believes the primary objectives should be to identify omissions and errors and to correct them expeditiously. Instituting a penalty would discourage such corrections.

Witness Coon states that this Commission does not have the authority to impose an involuntary fine upon BellSouth. However, if this Commission concludes that it may do so, BellSouth believes that the amount that has been proposed by our staff ($400 per day) is reasonable.

If performance data and reports are incomplete and inaccurate, witness Bursh states that the ILEC should be liable for payments of $1,000 to a state fund for every day past the due date for delivery of the original reports. She further states that some of the previous performance reports supplied by BellSouth have been inaccurate and incomplete.

The ALEC Coalition believes it is critical that this Commission set penalty amounts for late, inaccurate and incomplete posting of reports and data sufficient to motivate BellSouth to comply with its reporting obligations. Otherwise the self-enforcing mechanism of the remedy plan will be hampered because neither ALECs nor this Commission will be able to properly monitor BellSouth's performance. Additionally, the ALECs argue in their brief that if this information is not provided by the due date or is incomplete or inaccurate when provided, the ability of the ALEC and this Commission to determine if BellSouth is providing service at parity is hindered. Moreover, the problems that affect an ALEC's ability to serve its customers cannot be detected or corrected in a timely manner.

DECISION

We agree with the ALEC Coalition that a penalty is appropriate for "incomplete" and "inaccurate" reporting. We find that a penalty is necessary to encourage BellSouth to report this information in a complete and accurate fashion. Both the ALECs and this Commission must use this information to determine whether BellSouth is providing parity of service. The issue is the amount of penalty that should be assessed.

We find the appropriate penalty that shall be assessed is $400 per day for the aggregate of all reports. Since only 10 percent of the registered ALECs are accessing PMAP data, we find that $400 per day is the appropriate assessment versus the ALEC-proposed $1,000 per day. We question how important the accuracy of PMAP data is to ALECs since few ALECs actually access this information.

BellSouth shall pay the penalty to the Florida Public Service Commission for deposit in the State General Revenue Fund within 15 calendar days of the actual publication date. All parties are in agreement regarding where the assessed penalty should be submitted.

As previously stated, BellSouth witness Coon does not believe this Commission has the authority to impose involuntary fines upon BellSouth; however, BellSouth does state the $400 per day penalty is reasonable if this Commission does impose a penalty. Since BellSouth is agreeable to a $400 per day penalty, we find that the issue of our authority need not be addressed. Nevertheless, we find that if BellSouth did not agree, we could still impose penalties, as long as the requirements of due process are met, as set forth above.

We note the Performance Plans for Texas and Georgia also include requirements that ALECs have access to complete and accurate performance reports, or otherwise a penalty will be assessed. (Exhibit 1, Interconnection Agreement-Texas between Southwestern Bell Telephone Company and CLEC (T2A) 010700; Exhibit 1, Docket No. 7892-U, Order In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale, January 12, 2001) Georgia's penalty for incomplete or inaccurate reports is $400 to the affected ALEC for every day

past the due date, while Texas's penalty is $1,000 per day. (Exhibit 1, Docket No. 7892-U, Order In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale, January 12, 2001)

BellSouth shall develop a Performance Assessment Plan that includes a self-executing voluntary enforcement mechanism if performance data and reports are incomplete or inaccurate. A penalty of no less than $400 per day shall be assessed for the aggregate of all such reports. This payment shall be made to the Florida Public Service Commission, for deposit into the State General Revenue Fund, within 15 calendar days of the final publication date or the report revision date.

XIV. REVIEW PROCESS

We find it appropriate to approve the following stipulated position, which was agreed to by BellSouth, AT&T, e.spire, FCTA, WorldCom, KMC, Covad, Mpower, Z-tel, Time Warner and IDS:

3.0 Modifications to Measures

3.1 During the first two years of implementation, BellSouth will participate in six-month review cycles starting six months after the date of the Florida Public Service Commission order. A collaborative work group, which will include BellSouth, interested CLECs and the Florida Public Service Commission will review the Performance Assessment Plan for additions, deletions or other modifications. After two years from the date of the order, the review cycle may, at the discretion of the Florida Public Service Commission, be reduced to an annual review.

3.2 BellSouth and the CLECs shall file any proposed revisions to the Performance Assessment Plan one month prior to the beginning of each review period.

3.3 From time to time, BellSouth may be ordered by the Florida Public Service Commission to

modify or amend the Service Quality Measures or Enforcement Measures. Nothing will preclude any party from participating in any proceeding involving BellSouth's Service Quality Measures or Enforcement Measures or from advocating that those measures be modified.

3.4 In the event a dispute arises regarding the ordered modification or amendment to the Service Quality Measures or Enforcement Measures, the parties will refer the dispute to the Florida Public Service Commission.

XV. EFFECTIVE DATE

Here, we address when the Performance Assessment Plan becomes effective. BellSouth believes it should not become effective until interLATA authority is granted to BellSouth. However, the ALECs believe it should be effective immediately.

Arguments

BellSouth witness Cox states that it is appropriate that no part of the enforcement mechanism proposal take effect until the plan is necessary to serve its purpose - that is, until BellSouth receives interLATA authority. She believes the performance measurements are designed to measure compliance, not penalty assessment. Witness Cox admits during cross examination that if this Commission puts the plan into effect before 271 approval, the data that is generated could be used to prove BellSouth is providing parity service.

ALEC witness Bursh believes the remedy plan should go into effect as soon as it is ordered by this Commission. She states the performance measurement systems should be tested prior to 271 approval, so that any backsliding can be deterred.

In its brief, BellSouth argues that this issue involves two distinct questions: 1) when can the plan be implemented; and 2) when should the plan be implemented. As to the first question, witness Coon testified that "each modification and change to what

BellSouth has proposed will require a substantial amount of intensive effort" to implement.

BellSouth disagrees with Z-Tel that "the role of the performance plan is to ensure BellSouth's compliance with the terms of the interconnection agreement[s], not simply to get BellSouth 271 relief." BellSouth contends disputes under those agreements are to be remedied by a complaint to this Commission or pursuant to the terms of that agreement.

BellSouth also disagrees with the contention that the plan should be implemented now, to prove that BellSouth is providing compliant performance before filing its 271 application with the FCC. BellSouth states that implementing the plan now so that BellSouth's performance can be monitored would delay its 271 application and would duplicate the third-party testing to date.

Finally, BellSouth argues that even if the ALECs' arguments concerning implementation of measurements prior to 271 relief had merit, those same arguments provide no basis for the immediate implementation of penalties.

The ALECs argue that Louisiana and Georgia have recognized that a remedies plan should be adopted prior to an ILEC receiving 271 approval. Moreover, avoiding backsliding is only one of the reasons to implement a remedies plan. As witness Cox acknowledged, BellSouth is obligated to provide parity service under 251 whether or not BellSouth applies for 271 relief. By delaying implementation of a penalty plan until after 271 approval, "the Commission would forego the opportunity to enable more rapid development of competition." A penalty plan will encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition. It would also provide payments to ALECs to partially defray the additional costs attributable to inferior service by BellSouth due to discriminatory or non-parity service.

DECISION

The first question that needs to be addressed is when can the Performance Assessment Plan be implemented. BellSouth witness Coon testified that "[i]f an order is issued by July 31, 2001 adopting the SQM proposed by BellSouth, BellSouth can

produce all measurements and data during the fourth quarter of 2001." Therefore, it would take a minimum of 60 days to a maximum of 90 days if we were to adopt BellSouth's proposal. We note that the Performance Plan approved by the Georgia Commission required that the remedy plan go into effect 45 days from issuance of the order. (Docket No. 7892-U, Order In re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, January 12, 2001) We recognize that BellSouth may need a period of time to implement the Florida plan.

Regarding when the Plan should be implemented, we agree with BellSouth that nothing in the Act requires a Performance Assessment Plan be implemented prior to 271 approval. However, nothing in the Act prevents implementation of a Performance Assessment Plan prior to 271 approval. As stated above, a Performance Assessment Plan is consistent with both state and federal law. We agree with Z-Tel witness Ford that BellSouth is obligated to provide ALECS with nondiscriminatory access to its OSS under the provisions of Section 251 of the Act.

Both AT&T and Z-Tel maintain that the Performance Assessment Plan should be implemented before BellSouth is granted 271 approval. We agree with the ALECs that under Section 251 BellSouth owes ALECs a quality of OSS service at least equal to what it provides itself.

A Performance Assessment Plan is not a prerequisite to 271 approval, but a necessary tool to ensure that BellSouth is providing nondiscriminatory service. We agree with BellSouth that in general, disputes under agreements are to be remedied by a complaint to this Commission or pursuant to the terms of those agreement. However, as the FCC recognized "negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because new entrants are dependent solely on the incumbent for interconnection." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15577 (para. 216)(1996). Moreover, "the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself." Id. at 218. Finally, we have declined to arbitrate any penalty provision in

interconnection agreements, and have deferred any benchmarks, analogs, or penalty provisions to this generic docket. See Docket Nos. 000828-TP, 000731-TP, and 000649-TP. Therefore, we find that any penalty plan included heretofore within an agreement would not have the same effect as the one proposed herein.

We are requiring several changes to BellSouth's original performance assessment plan and to the strawman methodology. BellSouth is in the best position to modify its original plan to conform to the requirements of this Order. We recognize that some of the requirements of this Order are subject to interpretation. Therefore, our staff will conduct a status conference 30 days after the Final Order in this docket to discuss BellSouth's proposed performance assessment. Furthermore, our staff is directed to work with BellSouth regarding an appropriate date prior to the status conference by which a draft can be provided. BellSouth shall file a revised performance assessment plan consistent with this Order, within 45 days of the Final Order in this docket. Our staff has administrative authority to approve the performance assessment plan and enforcement mechanism if it complies with the Final Order in this docket. Because we are requiring changes to BellSouth's proposal, the Performance Assessment Plan shall become effective 90 days from the Order approving the Plan submitted in conformance with the Final Order in this docket. This would give BellSouth at least 135 days, excluding the time to approve the modified plan, from the date of the Order to "develop the requirements associated with the change, writing software code and testing the software code to protect the integrity of the production PMAP system while continuing to process and produce monthly SQM reports."

## XVI. ENFORCEMENT MEASUREMENT BENCHMARKS AND ANALOGS

In this Section, we identify the appropriate standards that should be used for purposes of determining if BellSouth is providing service to ALECs at parity with what BellSouth provides its retail customers. Standards for each metric are divided into two categories, they can be either a benchmark or a retail analog. Retail analog are for those measures for which there is an identifiable retail service to which the whole performance can be compared. Measures for which a benchmark is set requires

BellSouth to meet an absolute performance level. Failure on BellSouth's part to comply with the standards set forth in this Order would result in a self-executing remedy payment to either the individual ALEC who was received deficient service or to the State of Florida if aggregate service in the state falls below these standards.

Arguments

Witness Coon testified at hearing that the appropriate enforcement measurement benchmark and analogs were summarized in Exhibit 16 DAC-6. Witness Coon provides the following example of analogs with metric P-3: Percent Missed Installation Appointment:

| SEEM Disaggregation | SEEM Analog/Benchmark |
|---|---|
| Resale POTS | Retail Res and Business (POTS) |
| Resale Design | Retail Design |
| USE Loop and Port Comb | Retail Res and Business |
| USE Loops | Retail Res and Bus Dispatch |
| USE xDSL | ADSL provide to Retail |
| USE Line Sharing | ADSL provide to retail |
| Local Interconnection Trunks | Parity with retail |

The ALECs argue that in their plan BellSouth service to ALECs and to its own retail operations is gauged using a comprehensive set of performance measurements that cover a full panoply of BellSouth activities that ALECs must rely upon in order to deliver their retail service offerings in the local market place. Witness Bursh states that "[e]very submeasure is designed to identify and measure a key area of activity that affects ALEC and BellSouth customers, and consequently, the development of competition in Florida's local telecommunications market." Because the submeasures monitor key areas of ALEC and BellSouth activity, all submeasures proposed by the ALECs are included in the determination of remedy payments. The measures proposed in the ALEC remedy plan, including disaggregation, benchmarks and retail analogs, are set forth in the testimony and exhibits of witness Kinard.

The ALEC Coalition argues that the BellSouth proposal relies upon overly aggregated results. As witness Bursh states, "[s]uch aggregation masks differences and makes detection of inferior performance less likely." Specifically ALEC witness Bursh